Lebas Technologies Sdn Bhd v Malaysian Bio-Excell Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C(ARB)-46–09 OF 2017
DARRYL GOON JC
25 JUNE 2018

Arbitration — Award — Enforcement — Stay of enforcement of award — Plaintiff sought to enforce arbitration award pursuant to s 38 of the Arbitration Act 2005 — Defendant applied for court's order to stay plaintiff's application to enforce award or alternatively to suspend enforcement of award — Whether award binding — Whether defendant's application within purview of s 39 of the Arbitration Act 2005 — Whether plaintiff had approbated and reprobated — Whether principle of estoppel applicable — Whether payment made under award unjustly enriched plaintiff — Whether inherent jurisdiction of court could be invoked to stay enforcement of award — Arbitration Act 2005 ss 38 & 39

The defendant had entered into an agreement with Metabolic Explorer Sdn Bhd ('Metabolic') to design, build, equip, test and commission a biotechnology facility for the production of propanediol on a piece of land in Johor Bahru. Pursuant to an engineering, procurement, construction and commissioning contract ('the EPCC contract'), the defendant appointed the plaintiff to procure certain equipment in relation to the defendant's contract with Metabolic. On 15 March 2013, the defendant had terminated the EPCC contract which led the plaintiff to refer the dispute to the arbitration ('the first arbitration'). The arbitrator found in favour of the plaintiff and awarded RM6,559,440.30 being a part of the plaintiff's claim with interest at the rate of 5%pa from the date of the award until full payment and costs of the arbitration in the sum of RM601,850 ('the award'). However, there was an issue over the delivery of the equipment which resulted an action being filed in the Kuala Lumpur High Court ('Suit 87') by the defendant. By an order of the court, Suit 87 was stayed pending the disposal of the dispute related to the delivery of the equipment by the same arbitrators ('the second arbitration'). In the present action, the plaintiff sought to enforce the award pursuant to s 38 of the Arbitration Act 2005 ('the Act'). In response, the defendant filed a notice of application ('encl 9') to stay the plaintiff's application to enforce the award or, alternatively, to suspend the enforcement of the award, pending the disposal of the second arbitration. In support of encl 9, the defendant invoked s 39(1)(a)(vii) of the Act and submitted that the award had not yet become binding on the parties. The defendant had also invoked the principles of estoppel, unjust enrichment and the court's inherent jurisdiction.

Held, dismissing encl 9 with costs of RM20,000 to the plaintiff:

(1) It was a fallacy to suppose that merely because the issues in dispute in the second arbitration were somehow connected to those in the first arbitration, and thus the award, ergo the award had not yet become binding on the parties. This was a *non sequitur*. While the dispute in the first arbitration and the dispute in the second arbitration may stem from the same EPCC contract, they were nonetheless discrete and distinct disputes. The first arbitration was concerned with payment, but the second arbitration was concerned with the equipment. In the circumstances, there was no legitimate basis upon which it may be contended that the award had not yet become binding on the parties (see paras 29–30 & 34).

(2) The Act has the flavor of being an exclusionary legislation. It leaves very little avenue for the courts to intervene. The court has a conspicuously circumscribed role in arbitration proceedings governed by the Act. In regard to arbitral awards, there are specific grounds provided under s 39 of the Act as to when their recognition or enforcement may be refused. This leaves no room for the courts to admit of other grounds not provided. What the defendant was truly seeking in the present case was to be secured. The defendant wanted to be certain that when the payment was made under the award, it would receive the equipment that it intended to secure under the EPCC contract. However, what the defendant sought was not within the purview of s 39 of the Act (see paras 37–39 & 55).

(3) It could not be said that the plaintiff had reprobated and approbated merely because it had agreed that the dispute over the equipment should be the subject matter of an arbitration. This was merely because that dispute, like the dispute in the first arbitration, stemmed from the same EPCC contract in respect of which there was an arbitration agreement. However, the two disputes were different in substance. Equally it could not be contended that allowing the enforcement of the award would somehow contradict the order given by the court to stay Suit 87 pending the second arbitration. The stay granted was for a second and different dispute — albeit emanating from the same EPCC contract (see paras 47–48).

(4) In respect of estoppel, learned counsel for the plaintiff pointed out that there was never any agreement or promise by the plaintiff that it would be obliged to secure the equipment for the defendant. Based on a letter dated 2 March 2015 referred by the parties, the offer of assistance was specifically made without prejudice to the plaintiff's rights under the award. There was also nothing to suggest that the award was made because reliance was placed on some representation by the plaintiff (see paras 49–50).

(5) Payment under the award could not somehow be said to unjustly enrich the plaintiff. The order for payment was made by a dispute resolution process and by arbitrators agreed upon by the parties. It was a finding that the plaintiff was entitled to the payment ordered by reason of the defendant's wrongful termination of the EPCC contract. Hence, it was compensation for a breach of contract. There was no reason why this could be said to be an unjust enrichment (see para 52).

(6) The court's inherent powers to order a stay should not be grafted on to matters that legitimately fell within the ambit of the Act. Nothing in the Act admitted of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court. In any event, the application in encl 9 was not for a stay in its true sense. There was no pending appeal against the award. Therefore, there was no risk of the outcome of any appeal being rendered nugatory should the award be enforced. There was also no application to set aside the award. Accordingly, there was no reason why enforcement of the award should be stayed (see paras 53–54).

[Bahasa Malaysia summary

Defendan telah memasuki perjanjian dengan Metabolic Explorer Sdn Bhd ('Metabolic') untuk merekabentuk, membina, membekalkan, menguji dan menugaskan kemudahan bioteknologi untuk pengeluaran propanediol di sebidang tanah di Johor Bahru. Mengikut kontrak kejuruteraan, perolehan, pembinaan dan pentauliahan ('kontrak KPPP'), defendan telah melantik plaintif untuk mendapatkan peralatan tertentu berhubung dengan kontrak defendan dengan Metabolic. Pada 15 Mac 2013, defendan telah menamatkan kontrak EPCC yang membawa plaintif untuk merujuk pertikaian itu ke timbang tara ('timbang tara pertama'). Penimbang tara yang didapati memihak kepada plaintif dan diberikan RM6,559,440.30 menjadi sebahagian daripada tuntutan plaintif dengan faedah pada kadar 5% setahun dari tarikh award sehingga pembayaran penuh dan kos timbang tara dalam jumlah RM601,850 ('award'). Walau bagaimanapun, terdapat isu mengenai penyerahan peralatan yang menyebabkan tindakan yang difailkan di Mahkamah Tinggi Kuala Lumpur ('Guaman 87') oleh defendan. Mengikut perintah mahkamah, Guaman 87 ditangguhkan sementara menunggu pelupusan pertikaian yang berkaitan dengan penyerahan peralatan oleh penimbang tara yang sama ('timbang tara kedua'). Dalam tindakan sekarang, plaintif berusaha untuk menguatkuasakan award menurut 38 Akta Timbang Tara 2005 ('Akta tersebut'). Sebagai tindak balas, defendan memfailkan notis permohonan ('lampiran 9') untuk tinggal permohonan plaintif untuk menguatkuasakan award atau, sebagai alternatif, untuk menggantung penguatkuasaan award itu, sementara menunggu pelupusan timbang tara kedua. Dalam menyokong lampiran 9, defendan mengguna pakai s 39(1)(a)(vii) Akta dan mengemukakan bahawa award itu belum lagi mengikat pihak-pihak.

Defendan juga telah mengguna pakai prinsip-prinsip estopel, pengayaan tidak adil dan bidang kuasa sedia ada mahkamah.

Diputuskan, menolak lampiran 9 dengan kos sebanyak RM20,000 kepada plaintif:

(1) Adalah satu kesilapan untuk mengandaikan hanya semata-mata kerana isu-isu dalam pertikaian dalam timbang tara kedua adalah berkaitan dengan mereka dalam tibangtara pertama, dan oleh itu award itu, maka award itu masih belum mengikat pada pihak-pihak. Ini bukan *non sequitur*. Walaupun pertikaian dalam timbang tara pertama dan pertikaian dalam timbang tara kedua mungkin berasal dari kontrak KPPP yang sama, walau apa pun ia adalah pertikaian yang diskrit dan berbeza. Timbang tara pertama berkenaan dengan pembayaran, tetapi timbang tara kedua berkenaan dengan peralatan. Dalam keadaan ini, tidak ada asas yang sah di mana ia boleh dikatakan bahawa award itu masih belum mengikat pihak-pihak (lihat perenggan 29–30 & 34).

(2) Akta ini mempunyai peranan sebagai undang-undang yang tidak terkecuali. Ia memberi ruang yang sedikit untuk mahkamah campur tangan. Mahkamah mempunyai peranan yang jelas ditetapkan dalam prosiding timbang tara yang dikawal oleh Akta tersebut. Berhubung dengan award timbang tara, terdapat alasan-alasan khusus yang diperuntukkan di bawah s 39 Akta tersebut tentang bila pengiktirafan atau penguatkuasaan award tersebut boleh ditolak. Ini tidak memberi ruang kepada mahkamah untuk menerima alasan lain yang tidak diperuntukkan. Apa yang dipohon oleh defendan dalam kes ini adalah agar dilindungi. Defendan ingin memastikan bahawa apabila pembayaran dibuat di bawah award tersebut, ia akan menerima peralatan yang dimaksudkan untuk melindungi di bawah kontrak KPPP. Walau bagaimanapun, apa yang dipohon oleh defendan bukan dalam skop s 39 Akta terseut (lihat perenggan 37–39 & 55).

(3) Tidak boleh dikatakan bahawa plaintif telah meremehkan dan meluluskan semata-mata kerana telah bersetuju bahawa pertikaian terhadap peralatan itu haruslah menjadi hal perkara suatu timbang tara. Ini semata-mata kerana pertikaian itu, seperti pertikaian dalam timbang tara pertama, berpunca dari kontrak KPPP yang sama yang mana terdapat perjanjian timbang tara. Walau bagaimanapun, kedua-dua pertikaian itu berbeza dari segi kandungan. Begitu juga ia tidak boleh dipertikaikan bahawa dengan membenarkan penguatkuasaan award tersebut akan bertentangan dengan perintah yang diberikan oleh mahkamah untuk menggantung Guaman 87 sementara menunggu selesai timbang tara kedua. Penggantungan yang diberikan adalah untuk pertikaian kedua dan berbeza — walaupun berpunca daripada kontrak KPPP yang sama (lihat perenggan 47–48).

(4) Berhubung estopel, peguam yang bijaksana untuk plaintif menegaskan tidak pernah ada perjanjian atau janji oleh plaintif bahawa ia berkewajiban untuk mendapatkan peralatan itu untuk defendan. Berdasarkan surat bertarikh 2 Mac 2015 yang dirujuk oleh pihak-pihak, tawaran bantuan secara khusus dibuat tanpa menjejaskan hak plaintif di bawah award tersebut. Tidak ada juga yang menunjukkan bahawa award tersebut dibuat kerana kebergantungan yang diletakkan pada representasi oleh plaintif (lihat perenggan 49–50).

(5) Pembayaran di bawah award tersebut tidak boleh dikatakan secara tidak munasabah telah memperkayakan plaintif. Perintah pembayaran dibuat melalui proses penyelesaian pertikaian dan oleh penimbangtara yang dipersetujui oleh pihak-pihak. Ia adalah satu penemuan bahawa plaintif berhak kepada pembayaran yang diperintahkan oleh sebab penamatan salah defendan terhadap kontrak KPPP itu. Justeru, ia adalah pampasan bagi pelanggaran kontrak. Tidak ada sebab mengapa ini boleh dikatakan sebagai pengayaan yang tidak adil (lihat perenggan 52).

(6) Kuasa sedia ada mahkamah untuk memerintahkan satu penggantungan tidak patut dibuat berdasarkan perkara-perkara yang secara sah terjatuh dalam skop Akta tersebut. Tiada apa-apa jua dalam Akta tersebut yang menyatakan tentang penggantungan penguatkuasaan yang didasarkan pada keadaan khas yang biasanya boleh memberikan penggantungan pelaksanaan yang berkaitan dengan penghakiman mahkamah. Dalam apa jua keadaan, permohonan dalam lampiran 9 bukan untuk penggantungan dalam erti kata sebenar. Tiada rayuan yang belum selesai terhadap award itu. Oleh itu, tidak ada risiko keputusan apa-apa rayuan yang dikenakan jika award itu dikuatkuasakan. Tiada juga permohonan untuk mengetepikan award tersebut. Sehubungan itu, tidak ada alasan untuk penguatkuasaan award tersebut perlu digantung (lihat perenggan 53–54).]

Notes

For a case on enforcement, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1891.

Cases referred to

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal [2012] SGCA 57, CA (refd)

Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another

appeal [2016] 2 MLJ 309, FC (refd)
NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565, CA (refd)
Pepper (Inspector of Taxes) v Hart and related appeals [1993] 1 All ER 42, HL (refd)
R (on the application of Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654, HL (refd)
Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 35, 36, 38, 39, 39(1), (1)(a)(vii)

Tharmini Paramasivan (Sivabalan Sankaran with him) (Tan Swee Im, Siva & Partners) for the plaintiff.
J Vicknaraj (PX Leong with him) (Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc) for the defendant.

Darryl Goon JC:

[1] On 2 February 2015, pursuant to and following an arbitration between the parties, the plaintiff secured an arbitration award against the defendant. This arbitration award is headed as a 'final award' and shall simply be referred to as the 'award' hereinafter.

[2] The order, which is set out in para 167 of the award, states as follows:

> 167. The Tribunal therefore orders the Respondent [Defendant] to pay the Claimant [Plaintiff] (a) the sum of RM6,559,440.37, being a part of the Claimant's [Plaintiff's] claim, with interest on that sum at the rate of 5% per annum from the date of this Final Award until the date of full payment, and (b) the costs of this arbitration in the sum of RM601,850.

[3] Having secured the award, and by the originating summons herein, the plaintiff now seeks to enforce it pursuant s 38 of the Arbitration Act 2005 ('the Arbitration Act').

[4] However, in this originating summons, the defendant has filed a notice of application in encl 9. By this application the defendant seeks to stay the plaintiff's application to enforce the award or, in the alternative, to suspend the enforcement of the award, pending the disposal of an intended arbitration between the parties. It is the defendant's application in encl 9 that is being considered here.

A BACKGROUND

[5] On 1 November 2010 the defendant entered into a build, lease and transfer agreement with one Metabolic Explorer Sdn Bhd ('Metabolic') to design, build, equip, test and commission a biotechnology facility for the production of propanediol on a piece of land in Johar Bahru.

[6] In turn, and pursuant to an engineering, procurement, construction and commissioning contract dated 21 June 2011 ('EPCC contract'), the defendant appointed the plaintiff, to carry out certain works in relation to the defendant's contract with Metabolic. The works are defined in the EPCC contract and it included the procurement of certain equipment.

[7] On 15 March 2013 the defendant terminated its construction contract with the plaintiff. The plaintiff disputed this termination. The dispute was then brought to arbitration before an arbitral tribunal of three arbitrators. For reasons that will be clear later, I shall refer to this arbitration as the first arbitration.

[8] It was pursuant to the first arbitration that the award and the order that is set out above, was made. As can be seen, the order made by the learned arbitrators was for the payment of money. However, this monetary award included payment for certain equipment that the plaintiff was to secure under the EPCC contract.

[9] After the award, the defendant became concerned that if it paid out the moneys ordered by the arbitrators, there is nothing to ensure that the plaintiff will deliver or cause the delivery of the equipment purchased. The equipment in question were a salts removal process from Buss SMS Canzler Gmbh and a water removal process from GEA Wiegand Gmbh. For convenience, hereinafter, they shall remain collectively referred to as the equipment.

[10] The defendant was also particularly concerned that the plaintiff is a special purpose vehicle incorporated in this country especially for the EPCC contract. Its parent company is established in France. Now that the EPCC contract is over there is little, if anything, left in the plaintiff. If the plaintiff fails to deliver the equipment after payment, there is hardly any opportunity to obtain any realistic recourse against the plaintiff. The defendant's concern is therefore understandable.

[11] Following the award, the defendant commenced legal action against the plaintiff over the issue of the equipment. This was vide a Kuala Lumpur High Court Civil Suit No WA-22–87–08 of 2017 ('Suit 87').

[12] In response to this action the plaintiff contended that the issue in dispute is related to the EPCC contract and therefore the dispute should be referred to arbitration.

[13] By an order of the court of 15 November 2017, Suit 87 was stayed pending disposal of the dispute between the parties by arbitration, before the same arbitrators in the first arbitration. This then would be a second arbitration between the parties ('second arbitration').

[14] The notice to arbitrate issued by the defendant in the second arbitration is as follows:

(b) The Notice to Arbitrate

(a) Whether pursuant to the EPCC Contract, Bio-Xcell is entitled to the legal and/or beneficial ownership of the Equipment upon payment of the Arbitration Sum Awarded;

(b) Whether Bio-Xcell's right to the equipment is incidental and consequential to the decision of the Learned Arbitrators in giving full value to the Equipment based upon the final account;

(c) Whether Lebas's right to payment of the Arbitration Sum Awarded co-exists with a reciprocal obligation on the part of Lebas to deliver and/or transfer of ownership of the Equipment to Bio-Xcell;

(d) Whether the Arbitration Award is conditional upon and/or is subject to Lebas's ability to deliver and/or transfer ownership of the Equipment to Bio-Xcell; and

(e) Whether in the event of Lebas's inability to deliver and/or transfer of ownership of the Equipment to Bio-Xcell, Lebas is estopped and/or precluded from enforcing the Arbitration Award and/or is liable to account to Bio-Xcell for monies paid by Bio-Xcell to Lebas in respect of the said Equipment.

THE DEFENDANT'S CASE

[15] The defendant raised several arguments in support of its application. The first is predicated on a contention that the award has not yet become binding. This is a contention that invokes s 39(1)(a)(vii) of the Arbitration Act.

[16] Section 39(1)(a)(vii) of the Arbitration Act states as follows:

39 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —

(a) where that party provides to the High Court proof that —

A ...

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

B

[17] In invoking this provision of the Arbitration Act, counsel for the defendant characterised his contention by maintaining that the issues in the second arbitration is 'inextricably connected' to the award. Both payment and delivery of the equipment are directly connected and hence, a decision only in C relation to payment is still not complete and thus not yet binding because the connected issue of delivery has yet to be determined.

[18] Secondly, the defendant asserts that the plaintiff is estopped from enforcing the award for payment until the equipment are secured for the D plaintiff by the defendant. This is because in the arbitration, there was no dispute that the plaintiff was to deliver the equipment. The representation was that the equipment were ready to be delivered. The defendant further contends that in its letter to the defendant of 2 March 2015, the plaintiff had agreed to E use its best endeavours to arrange for the transfer to the defendant of the ownership rights in the equipment procured for the defendant by the plaintiff. There would also be a risk of inconsistency if the payment is enforced but the equipment not delivered. Counsel for the defendant, however, concedes that the award itself does not paid payment thereunder conditional upon delivery of F the equipment.

[19] Thirdly, the defendant contends that, in maintaining that the dispute over the equipment under the EPCC contract should be arbitrated and, at the same time, applying to enforce the arbitration award, the plaintiff is both G approbating and reprobating. These two positions taken are not consistent. In the circumstances of this case, according to the defendant, to allow the enforcement of the award would be inconsistent with the order for stay pending arbitration in Suit 87.

H

[20] Fourthly, should the order for payment in the arbitration award be enforced it would result in the plaintiff being unjustly enriched. The plaintiff would have secured payment without having the equipment delivered.

I **[21]** Fifthly, in addition, the defendant contends that the court retains an inherent jurisdiction to stay the enforcement of an arbitration award upon the principles enunciated by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1.

[22] Thus, in seeking to stay the plaintiff's application to enforce or to suspend the enforcement of the award, the defendant has not only invoked s 39(1)(a)(vii) of the Arbitration Act but also principles beyond the Arbitration Act such as estoppel, unjust enrichment and the court's inherent jurisdiction.

THE PLAINTIFF'S CASE

[23] The plaintiff refutes these contentions of the defendant.

[24] Directly put, the plaintiff's argument is that the court has no jurisdiction or power to refuse to enforce the award except as provided under the Arbitration Act. The only orders that the court may make, and the only grounds that are permitted therefor, are those found in the Arbitration Act. The orders sought and the grounds relied upon by the defendant are not provided in the Arbitration Act.

[25] The plaintiff further contends that the award is not conditional and is discrete from the dispute in the second arbitration or any award that may be made thereunder. The award is not conditional in anyway and it therefore cannot be maintained that the award has not yet become binding but is somehow dependant on the outcome of the second arbitration.

SECTION 39(1)(A)(VII) OF THE ARBITRATION ACT

[26] Section 39(1) of the Arbitration Act permits a *refusal* to recognise or enforce an arbitration award. It does not provide for any *stay* of an application to enforce or a *suspension* of the enforcement of an arbitration award. At the risk of being pedantic, the orders sought by the defendant are therefore not within the provisions of s 39 of the Arbitration Act.

[27] However, the defendant has invoked s 39(1)(a)(vii) of the Arbitration Act. If this is warranted, it would mean the court may refuse to enforce the award. Whether it be a stay or suspension, suspect, would matter not to the defendant.

[28] It is also significant that the defendant has not made any application to set aside the award itself.

[29] In so far as s 39(1)(a)(vii) itself is concerned, can it be maintained that the award has yet to become binding? I am of the view that it cannot. With respect to learned counsel for the defendant, I think it is a fallacy to suppose that merely because the issues in dispute in the second arbitration are somehow connected to those in the first arbitration, and thus the award, *ergo* the award has not yet become binding on the parties. This is a *non sequitur*.

[30] While the dispute in the first arbitration and the dispute in the second arbitration may stem from the same EPCC Contract, they are nonetheless discrete and distinct disputes. This would be so even if in the second arbitration, findings of fact or issues raised in the first arbitration are to be relied upon. The first arbitration was concerned with payment. The second arbitration is concerned with the equipment.

[31] From the notice to arbitrate, there appears to be an attempt to link the issues in dispute in the second arbitration to the first arbitration. Yet, this still does not make the award dependant or conditional upon the outcome of the second arbitration. Whatever the outcome of the second arbitration, the award will remain as it is. Particularly, since there is no application to either set aside or suspend the award itself.

[32] To this point, I am also mindful of the provision in s 36 of the Arbitration Act which provides thus:

> 36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
>
> (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[33] In addition, there is no evidence led or argument raised to suggest that there is or has been any application made under s 35 of the Arbitration Act to correct or interpret the award or for any additional award in the first arbitration.

[34] Therefore, in the circumstances of this case, I find that there is no legitimate basis upon which it may be contended that the award has not yet become binding on the parties.

CONTENTIONS BEYOND THE ARBITRATION ACT

[35] Apart from the reliance on s 39(1)(a)(vii) of the Arbitration Act, the defendant's case is also based on contentions and principles beyond the provisions of the Arbitration Act.

[36] As learned counsel for the plaintiff submitted, s 8 of the Arbitration Act is clear. It states in no uncertain terms:

> 8 No court shall intervene in matters governed by this Act, except where so provided in this Act.

[37] The Arbitration Act therefore has the flavour of being an exclusionary legislation. It leaves very little avenue for the courts to intervene. Similar to the situation in Singapore, as expressed by Sundaresh Menon JA (as he then was), '... in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act ...' (see *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57; see also *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 generally and at p 115).

[38] To paraphrase the Singapore Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565, the court has a conspicuously circumscribed role in arbitration proceedings governed by the Arbitration Act. As was pointed out by Asiah Ali J (as Her Ladyship then was) in *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872:

> I am of the opinion that the extent of the court's power to intervene is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene.

[39] In regard to arbitral awards, there are specific grounds provided under s 39 of the Arbitration Act as to when their recognition or enforcement may be refused. This leaves no room for the courts to admit of other grounds not provided. To do so would run counter to the legislative intent of the Arbitration Act. I would add that the legislative intent, even from the provisions of the Arbitration Act itself, is sufficiently apparent.

[40] To re-inforce this view of the Arbitration Act, counsel for the plaintiff placed before me the Arbitration Bill 2005. This was with the intention of drawing the court's attention to the explanatory statement on the proposed amendment that led to s 8 of the Arbitration Act in its current form.

[41] Since the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42, the courts' reluctance to consider extraneous material to aid in statutory construction has somewhat abated (see also for example the decisions of the Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 and *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309). However, in *Pepper (Inspector of Taxes) v Hart and related appeals*, this latitude given was in respect of Parliamentary material and, only when the legislation is ambiguous or obscure or when the literal meaning led to absurdity.

[42] Since *Pepper (Inspector of Taxes) v Hart and related appeals*, the latitude given to enable consideration of extraneous material continued. In *R (on the*

application of Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654, Lord Steyn observed that, '... since Explanatory Notes are now sometimes placed before the House, it would be sensible to clarify their status'. This, Lord Steyn did in the following terms:

At p 657:

> [5] The question is whether in aid of the interpretation of a statute the court may take into account the explanatory notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at pp 240–241; [1971] 1 WLR 1381 at pp 1384–1386, and in *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at p 574; [1976] 1 WLR 989 at pp 995–996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98 at pp 114–115; [1998] 1 WLR 896 at pp 912–913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at p 763; [1874–80] All ER Rep 1 at p 11, Lord Blackburn explained the position as follows:
>
> > ... I shall ... state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.
>
> Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White Papers, and the like. After all, the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross Statutory Interpretation* (3rd Ed, 1995) pp 160–161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary*

of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195 at pp 226–227; [2001] 2 AC 349 at p 407, *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] All ER (D) 364 (Jul), in particular per Lord Hoffmann (at [40]). On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: see *Pepper v Hart; A Re-examination* (2001) 21 OJLS 59.

[43] I am of the view that it is both reasonable and makes logical sense for a court of law to be able to refer to explanatory statements in aid of statutory interpretation — specifically for the purpose expressed by Lord Steyn, that is, to '... cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed ...'. However, and I stress, I do not suggest that what appears in explanatory statements may somehow be used to negate or defeat clear and express provisions in a statute. For the purposes of this case, if they are to be used, it would only be to support or reinforce the view that is generally held that the legislative regime of the Arbitration Act is to minimise, and in situations where express provisions exists, to exclude, intervention by the courts. It is for this limited purpose that I am willing to refer to the explanatory statement pertaining to the Arbitration Act submitted by counsel for the plaintiff.

[44] In relation to s 8 of the Arbitration Act, the explanatory statement of the bill states as follows:

> Clause 3 seeks to amend section 8 of the Act 646 to adopt, with modification, the language used in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985. This provision is to limit court intervention to situations specifically covered by Act 646 and to discourage the use of inherent powers.

[45] Regrettably, the last sentence in the explanatory statement could have been better worded. Nevertheless, the idea is still consistent with the view that is generally espoused and that is, in situations where there are express provisions in the Arbitration Act, there is no room for judicial intervention.

[46] Quite apart from whether the court may interfere upon the bases submitted by learned counsel for the defendant, I am also of the view that these bases are not made out.

[47] It cannot be said that the plaintiff had reprobated and approbated merely because it had agreed that the dispute over the equipment should be the subject matter of an arbitration. This is merely because that dispute, like the dispute in the first arbitration, stems from the same EPCC contract in respect of which there is an arbitration agreement. However, the two disputes are

different in substance. One concerns the right to payment while the other, the right in and to be provided the equipment.

[48] Equally it cannot be contended that allowing the enforcement of the award would somehow contradict the order given by the court to stay Suit 87 pending the second arbitration. Again, the stay granted was for a second and different dispute — albeit emanating from the same EPCC contract.

[49] Insofar as the estoppel that is sought to be invoked by the defendant is concerned, learned counsel for the plaintiff pointed out that there was never any agreement or promise by the plaintiff that it would be obliged to secure the equipment for the defendant. What the plaintiff agreed to do was set out in a letter dated 2 March 2015 which was referred to by the parties. The relevant paragraphs of this letter states as follows:

> However our client is amenable to assist and facilitate your client to obtain a transfer of the ownership rights to the equipment. For that purpose, our client is prepared to execute a disclaimer of ownership to the equipment supplied by Buss SMS Ganzler and GEA Wiegand. As regards the ABB equipment, the supplier's sub-contract was mainly for the development of specific software directly customized for Metex's processes. For confidentiality reasons, our client is not entitled to transfer data as they do not hold the intellectual property of Metex's process. If you need to have the rights transferred, your client will have to get the approval and endorsement of Metex before our client can assist your client in transferring the rights to the ABB equipment.
>
> All the above will necessarily take time to achieve and our client will use their best endeavours to arrange for the transfer of the ownership rights. Our client's assistance is without prejudice to all their rights under the Final Award and therefore is not and cannot be taken to mean your client need not pay the awarded sum until the rights are finally transferred. It is our client's position the award sum as requested in our letter of 23.2.2015 should be paid by the date stated therein.

[50] As can be seen, the offer of assistance was specifically made without prejudice to the plaintiff's rights under the award. In addition, I would add that there is also nothing to suggest that the award was made because reliance was placed on some representation by the plaintiff.

[51] Learned counsel for the plaintiff also pointed out that it was a finding by the learned arbitrators that the reason the defendant did not receive one of the equipment sent to it was due to the defendant's own fault. After considering the arguments and evidence, the learned arbitrators in the award made clear their finding in the following terms:

> 90. The Tribunal therefore finds that it was the Respondent's fault [Defendant] that this equipment was shipped back and that therefore the Project Manager was not justified in giving zero value for it.

[52] With respect to learned counsel for the defendant, payment under the award cannot somehow be said to unjustly enrich the plaintiff. The order for payment was made by a dispute resolution process and by arbitrators agreed upon by the parties. It is a finding that the plaintiff is entitled to the payment ordered by reason of the defendant's wrongful termination of the EPCC contract. Hence, it is compensation for a breach of contract. There is no reason why this may be said to be an unjust enrichment. In addition, the evidence is that the plaintiff was to procure the equipment for the defendant from Buss SMS Canzler Gmbh and GEA Wiegand Gmbh. There is no evidence to suggest that the plaintiff has kept or will get to keep the equipment in question.

[53] It is also because of the nature of the legislative regime discussed above that I am of the view that the court's inherent powers to order a stay as amplified in cases such as *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, should not be grafted on to matters that legitimately fall within the ambit of the Arbitration Act. Nothing in the Arbitration Act admits of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court.

[54] In any event, in the circumstances of this case, the application in encl 9 is not for a stay in its true sense. There is no pending appeal against the award. Therefore there is no risk of the outcome of any appeal being rendered nugatory should the award be enforced. There is also no application to set aside the award. Accordingly, there is no reason why enforcement of the award should be stayed.

[55] To my mind, what the defendant is truly seeking in this case is to be secured. It wants to be certain that when it pays the plaintiff under the award, it will receive the equipment that it intended to secure under the EPCC contract. However, what the defendant seeks is not within the purview of s 39 of the Arbitration Act. Indeed, if the issues in dispute in the second arbitration could have been, or was, addressed and resolved in the first arbitration, the problem presented in this case would not have arisen.

[56] For the reasons given above, the defendant's application in encl 9 is dismissed. After hearing learned counsel for the parties on the issue of costs, I order costs of RM20,000 to the plaintiff.

Enclosure 9 dismissed with costs of RM20,000 to the plaintiff.

Reported by Dzulqarnain Ab Fatar